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Supreme Court of the United States

October Term, 1958

No. 631

JULES S. SOTTNEK CO., INC., SOTTNEK TERMINAL CORPORATION,

Petitioners,

v.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
I—Opinions of the courts below	1
II—Grounds on which the jurisdiction of this Court is invoked	2
III—Date of judgment	2
IV—Date of order respecting a rehearing	3
V—The statutory provisions which confer jurisdiction on this Court to review the judgment in question	3
VI—The questions presented for review	5
VII—The constitutional provision involved	6
VIII—A concise statement of the case	7
IX—Argument	11
CONCLUSION	18
APPENDIX—Opinion of United States Court of Appeals for the Second Circuit	19

Cases Cited

Franklin v. Skelly Oil Co., 141 Fed. 2d 568	14
Hawkins v. United States, reported in U. S. Sup. Ct. Reports, Vol. 3, L. Ed. 2nd 125, decided Nov. 24, 1958	16
Johnson v. Lutz, 253 N. Y. 124	12
Korte v. New York, New Haven & Hartford R.R. Co., 191 Fed. 2d 86	17
Masterson v. Pennsylvania R. Co., 182 Fed. 2d 793	18
Palmer v. Hoffman, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645	2, 13, 18
Roberts v. New York City, 295 U. S. 264	16
Williams v. Alexander, 309 N. Y. 283	11, 13

Other Authorities Cited

	PAGE
28 U. S. Code, Section 1732, Rule 43(a)	2, 3, 4, 5, 11, 18
Fifth Amendment	2, 5, 6
Civil Practice Act of State of New York, Sec. 374-a	4, 11, 13
N. Y. City Charter and Administrative Code, Chap. 19, Sec. 488	5

IN THE

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court, Southern District of New York, entered on the verdict of a jury.

I.

Opinions of the courts below.

The opinion of J. Edward Lumbard, Ct. J. of the United States Court of Appeals, Second Circuit, and the concurring opinion of Charles E. Clark, Ch. J., officially reported in 258 Fed. 2nd, 85, appears in full in the appendix hereto, at pages 19-25. The petition for rehearing was denied, without opinion.

II.

Grounds on which the jurisdiction of this Court is invoked.

Review is sought of the judgment of the Court of Appeals, Second Circuit, in civil docket No. 24619 entered on the docket of said Court on April 12, 1957 on the grounds:

(1) The Court of Appeals, Second Circuit, has rendered a decision in conflict with the Court of Appeals, Third Circuit, with respect to the admissibility of documents under the evidence rule contained in 28 U. S. Code Section 1732.

(2) That the admisison of documents into evidence under Section 1732 is an important rule of evidence which is not settled.

(3) That the decision appealed from conflicts with the decision of this Court in *Palmer* v. *Hoffman*, 318 U. S. 109; 63 S. Ct. 477, 87 L. Ed. 645.

(4) That although the Court of Appeals, Second Circuit, held the fire marshal's report to be inadmissible, nevertheless, it was allowed to stand as the basis of a finding of fact by the jury affecting petitioners' substantial rights, depriving them of property without due process of law and in violation of the Fifth Amendment of the Federal Constitution.

III.

Date of judgment.

The judgment of the United States Court of Appeals for the Second Circuit, dated July 15, 1958, was entered July 15, 1958.

IV.

Date of order respecting a rehearing.

The petition for rehearing was filed July 30, 1958, and the order denying same, per curiam, dated November 5, 1958, was entered November 5, 1958.

V.

The statutory provisions which confer jurisdiction on this Court to review the judgment in question.

The statutory provisions and rules of law involved are the following:

28 U. S. Code, Section 1732, entitled "Record made in the regular course of business" reads:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> "The terms 'business', as used in this section, includes business, profession, occupation, and calling of every kind. June 25, 1948, c. 646, 62 Stat. 945."

Rule 43(a) Federal Rules of Civil Procedure, 28 U. S. Code, entitled "Evidence" reads:

> "Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

The state statute, Section 374-a of the Civil Practice Act of the State of New York, entitled "Admissibility of Certain Written Records", which the Circuit Court for the Second Circuit overrode and which is necessarily involved, reads as follows:

> "Admissibility of certain written records. Any writing or record, whether in the form of an entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and call of every kind."

New York City Charter and Administrative Code, Chapter 19, sections 488 (2)-1.0 to 488 (2)-8.0 inclusive, entitled "Fire Department * * *," which appear in the Addenda to the Appendix to appellants' brief, pages 194a to 197a, being a part of the certified transcript of the record, filed herewith.

VI.

The questions presented for review.

Review is sought of the judgment of the Court of Appeals, Second Circuit, on the ground that the report of the New York City Fire Marshal, promulgated in total disregard of the requirements of the local ordinance authorizing same, and stating that the cause of fire was due to "smoking carelessness", was received in evidence in the trial court, under the federal statute permitting the introduction of records kept in the usual course of business, 28 U. S. Code, Sec. 1732, and although held by the Court of Appeals, Second Circuit, to be inadmissible, was nevertheless allowed to stand and permitted to be the basis of a finding of fact affecting petitioners' substantial rights, depriving them of property without due process of law in violation of the 5th amendment of the Federal Constitution. Therefore, the following questions are presented for review.

(1) Did the Court of Appeals for the Second Circuit err when it refused to hold as reversible error the admission into evidence by the trial court of the New York City Fire Marshal's report as to the cause of the fire, based on the unsworn and unrecorded statements of twenty or more persons, whom the fire marshal interviewed but who were not produced for cross-examination save one, and he testified for petitioners, denying that he had told the fire marshal that the fire was due to "smoking carelessness".

(2) Was not the allowance in evidence of the fire marshal's report in conflict with applicable New York decisions and should not the Court of Appeals for the Second Circuit, adhere to the local decisions.

(3) Was not the decision of the Court of Appeals for the Second Circuit in respect to the admissibility of said report a departure from the usual course of judicial proceedings, and so far a departure as to call for an exercise of this court's power of supervision.

VII.

The constitutional provision involved.

The Constitutional provision involved is the Fifth Amendment to the Constitution of the United States. (The language of the amendment involved in this petition is italicized.)

"AMENDMENT (V.)

> *No person shall be* held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be *deprived of* life, liberty, or *property without due process of law;* nor shall private property be taken for public use, without just compensation."

VIII.

A concise statement of the case.

On April 24, 1951, respondent's scow, CRR 230, while tied up to a bulkhead in Brooklyn, N. Y., loading cargo, was damaged by fire which originated in a stow of 3,000 bags of napthalene, piled on the open storage area, pier 32, close to which the scow was moored. The fire occurred about 2 o'clock in the afternoon, shortly after the longshoremen, working the vessel from which the napthalene had been discharged, returned from lunch. Lated, during the progress of extinguishing the fire, the New York City Fire Marshal, Martin Scott and Deputy Fire Marshal Vincent M. Canty, arrived on the scene to investigate the cause of the fire. They intervewed a score of persons standing about, several of whom were taken to the police station for further interrogation. No one of the persons interviewed were sworn, nor were their statements taken down verbatim. Deputy Fire Marshal Canty referred to these statements as the basis of his official report, giving as the cause of fire "smoking carelessness". (Respondent's Exhibit 7, opposite page 186a of the Appendix to Appellants' Brief, filed as part of the certified record, herewith.)

As soon as respondent at the trial offered the fire marshal's report in evidence, petitioners objected to its being received, upon constitutional grounds, as follows:

> "Mr. Stefferson: I object on the ground that this appears to be a report made by the assistant fire marshal, but it is based entirely upon hearsay evidence. I think the whole effect is to deprive the person of due process of law, since I believe cross-examination would develop that witnesses were not properly arraigned and sworn and the testimony was not taken in the form of question and answer as directed by the ordinance of the City of New York.
>
> I wish to reserve my constitutional point at this time because I understand if I am to raise a con-

stitutional question it has to be raised upon the record in the trial court.

Mr. Conners: May I, for the record voice (209) my objection upon the same ground that Mr. Stefferson has, and on the further ground that it is inadmissible as a hearsay document and self-serving.

The Court: Do you wish to be heard, Mr. Kelly?

Mr. Kelly: Yes, I do. I believe that the witness testified that this is a record showing the cause of the fire, which record is kept in the regular course of business by the Fire Department of the City of New York. It is an official document. It was prepared by the witness and was prepared as a result of this fire and it certainly is admissible as an official document and any hearsay statements in the report are certainly an exclusion to the hearsay rule.

The Court: I see no validity to either objection. This has the same validity as any police report or anything of that kind, which is acceptable in any court of law.

Mr. Stefferson: Exception." (Appendix to Appellants' Brief, pp. 79a and 80a.)

The report of the fire marshal's investigation was not only formulated in total disregard of the local ordinance, providing that in conducting an investigation, he shall take the testimony, under oath, of persons cognizant of the facts, and have the same reduced to writing and verified, but the report was admittedly based on what the fire marshals had been told by unidentified persons, save Barnao, who took the witness stand and categorically denied the statement imputed to him.

Scott's testimony, disclosing that his informants were unidentified except Barnao, read as follows:

"Q. Do you have in your records any witness outside of Mr. Barnao's name? (445) A. Other than Barnao?

Q. Do you have any other witness in your portfolio whose name is written down in your report other than Mr. Barnao? A. No, sir.

Q. And on the basis of Mr. Barnao's allegedly telling you that he saw people carrying cigarettes you issue this public document? A. That is absolutely false.

Q. Then on what basis did you issue it? A. It was based on his statement, plus other statements that were in support of that, whose names do not appear on the report because we felt that would be unnecessary." (Appendix to Appellants' Brief, pp. 159a and 160a.)

However, at another place Scott admitted that he did not write down Barnao's name at the scene of the fire; that it was given to him by Deputy Marshal Canty, shown as follows: (Appendix to Appellants' Brief, pp. 156a and 157a.)

"Q. You said a minute ago that many witnesses told you that there was smoking there. A. Oh, sure.

Q. But you only wrote one name down. Barnao's, didn't you? (440) A. I didn't write this down, to be truthful with you.

Q. Who wrote it down? A. Mr. Canty, who was there. There were four or five marshals there on that day."

Chief Fire Marshal Scott admitted that he had no eye witnesses to the fire (Appendix to Appellant's Brief, p. 163a):

"Q. Marshal Scott, you had no eye witnesses to the fire, is that right? A. I had no eye witnesses to the cause of the fire.

Q. Yes? A. Yes."

However, the sum total of the testimony of Chief Fire Marshal Scott is that the conclusion formed by him and his deputy, Canty, that the cause of the fire was smoking carelessness, was predicated on nothing more nor less than his interrogation of persons standing about the scene of the fire—the unsworn hearsay statements of unidentified

third parties. The basis for their findings was as simple as that and was so declared by Mr. Scott at the trial.

> "Q. Mr. Scott, Marshal Scott, the sum total of your findings is that someone said or told you that people were carrying cigarettes on the pier. A. That is not my statement; that is yours, sir.
>
> Q. I see. What is your finding then? A. My finding is this, sir:
>
> That as a result of the interrogation at the pier of several witnesses the conclusion was formed by us, and it is my opinion that the cause of the fire was smoking carelessness, and it is as simple as that." (Appendix to Appellant's Brief, p. 161a.)

The foregoing circumscribed the extent of the fire marshal's investigation. Their opinions as to the cause of the fire had no other source.

In overruling petitioners' objection at the trial to the admission of the report, the Court made the following extraordinary statement, sustaining its ruling:

> "I guess I have tried a hundred thousand cases in my time and I have never known of any Judge or any Court to fail to accept the report of a fire marshal, and I have accepted it here and it is going to stand." (Appendix to Appellant's Brief, p. 161a.)

And again the trial court made the following remark:

> "This is a report from a responsible agency and I am accepting it as such." (Appendix to Appellant's Brief, p. 169a.)

The basis for federal jurisdiction in the court of first instance is diversity of citizenship for an amount in excess of three thousand ($3,000) dollars, the jurisdictional amount applicable at the time of filing suit.

IX.

Argument

The Court of Appeals for the Second Circuit, having found that the fire marshal's report was erroneously admitted into evidence, who can say, it is respectfully asked, that it did not unduly influence the jury in arriving at its verdict for respondent and prejudice the rights of the petitioners. Only a new trial can serve to correct the error and remove the prejudice.

Rule 43 of the Federal Rules of Civil Procedure provides that the federal courts give consideration to local rules of evidence and it should be noted that the State of New York, too, has its own statute covering the admissibility of written records, known as Section 374a of the New York Civil Practice Act, which is similar in language to that used in 28 U.-S. Code Section 1732. It should be further noted that the highest tribunal in New York has passed upon the very question presented here and held that when a report is received in evidence under said section 374a and found to have been erroneously received by the trial court and submitted to the jury, there must be a new trial.

In *Williams* v. *Alexander,* 309 N. Y. 283, decided 1955, the majority of the New York Court of Appeals held that a statement allegedly made by the plaintiff as to the circumstances of his accident and contained in a hospital report is inadmissible and that the erroneous admission was so prejudicial as to constitute reversible error and require a new trial, stating that "In conclusion then, that portion of the hospital record containing the statement made by plaintiff as to the manner in which the accident happened was erroneously admitted, and, since we can not say that it did not influence the jury in arriving at its verdict, there must be a new trial."

It should be noted in passing that the New York Court of Appeals in *Williams* v. *Alexander* (*supra*) cited with ap-

proval its former decision in *Johnson* v. *Lutz*, 253 N. Y. 124, decided 1930, wherein it held that a police report (which in principle is no different than a fire report) was inadmissible and that section 374a was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto.

It is respectfully submitted that the Court of Appeals for the Second Circuit in considering the appeal in the instant case misconceived the nature and extent of "the circumstances of the case" by virtue of which they said that the receipt of the fire marshal's record in evidence was not reversible error. The Court in its opinion characterized "those circumstances" to be that petitioners called the chief fire marshal as a witness and that both the chief and his depty (Canty) testified that they believed the fire to have been caused by "smoking carelessness" and that the receipt of the report was parallel to their testimony and merely cumulative and therefore not reversible error.

In the light of the record this reasoning is difficult to understand. To begin with the only purpose that petitioners had in calling the chief fire marshal was the fact that his report had been received over their strenuous objection and they desired to show the court and jury that the report was based not on any observation made by the fire marshal or his deputy but had been made up from oral statements of 20 or more unidentified third persons, save one, who were not available for cross-examination to test their veracity.

Further, the Court of Appeals for the Second District failed to observe that the testimony of the chief and his deputy did not go beyond the scope of the report itself, for they were unable to offer any explanation for the cause of the fire from their own independent observations or beyond what was contained in their report, which in turn was based on nothing more than hearsay. Indeed the chief fire marshal admitted that he had no direct eye witnesses as to the cause of the fire, when he testified:

"Q. Marshal Scott, you had no eye witnesses to the fire, is that right? A. I had no eye witness to the cause of the fire.

Q. Yes? A. Yes." (Appendix to Appellant's Brief, page 163a)

Equally significant is the following testimony of Chief Fire Marshal Scott, which indicates very clearly that his finding, that the cause of the fire was "smoking carelessness", rested entirely on his interrogation of third persons at the scene of the fire and not upon any independent observations of his own:

"Q. Mr. Scott, Marshal Scott, the sum total of your findings is that someone said or told you that people were carrying cigarettes on the pier? A. That is not my statement; that is yours, sir.

Q. I see. What is your finding then? A. My finding is this, sir: That as a result of the interrogation at the pier of several witnesses the conclusions was formed by us, and it is my opinion that the cause of the fire was smoking carelessness, and it is as simple as that." (Appendix to Appellant's Brief, page 161a)

The Court of Appeals erred where it held that the testimony of the fire marshals and the report were parallel and cumulative. The fact is that the report went beyond the testimony of the fire marshals and attributed the fire to smoking carelessness on the part of petitioner's employees, based on the alleged observations of third parties made before the fire whereas the fire marshals were not there before the fire to make observations on their own. They merely opinioned that the fire was due to smoking carelessness on what the third parties told them.

It has been pointed out by this honorable court when considering section 1732 in *Palmer* v. *Hoffman*, 318 U. S. 109 and by the New York Court of Appeals when considering section 374a, in *Williams* v. *Alexander*, 309 N. Y. 283, that the utility of these sections rests upon the probability of trustworthiness which inheres in such records by virtue of the fact, first, that they are the routine reflections of the

day to day operations of a business and, second, that it is the entrant's own obligation, and to his interest, to have them truthful and accurate. It is the element of trustworthiness which serves to avoid calling the person who made the record.

However, the point to be observed in the instant case, which the Court of Appeals did not seem to have considered was that cross examination of the fire marshals could not serve to test the trustworthiness of the statements made to them by unidentified third parties, and upon which the fire marshals concluded that the fire was caused by smoking carelessness. If anyone was to be subject to examination to test the trustworthiness of the fire marshal's report it was the informants, upon whom the fire marshals relied.

The United States Court of Appeals, Tenth Circuit, in *Franklin* v. *Skelly Oil Co.*, 141 Fed. 2d 568, pointed out that expressions of opinion and conclusions on causes and effects, contained in a fire inspector's report, based on factual findings are not admissible, when it is shown that the conclusion or opinion, which the report purports to convey would not be admissible in evidence if the denial of the right of cross examination would result in the perversion of the rule of trustworthiness and reliability.

The members of this court, from their own trial experience, can well imagine the powerful impact which the introduction of the fire marshal's report made upon the jury, endowed as it was with an official status, and concluding as it did with the terse statement, "cause of fire: smoking carelessness." The introduction of the report supplanted the function of the jury. The jury's verdict was merely a formal ratification of the fire marshal's report. To say that the introduction of a document in that form was error but was excusable because it was parallel to the testimony of the fire marshals is not comprehensible as a matter of law. The report being hearsay, it adds not a cubit to the quality of the testimony of the fire marshals to use the report as a measure of competency. The quality

of the fire marshals' testimony can never be better than the source from which it sprung—namely, hearsay. Not having ranged beyond it they are tethered by it. The final result is that petitioners have not had a fair trial and are rendered judgment debtors on the statements of unknown persons, who, in effect, have had their say without the petitioners being afforded the right to be confronted by them and to cross-examine them.

Inasmuch as the fire marshal and the chief fire marshal were present at the trial and actually testified, it was obviously a maneuver on the part of the plaintiff to sway the jury by an "official document" and a report "in black on white". Documentary evidence is admissible in a proper case to obviate the necessity of the personal attendance at a trial of an unreasonable number of witnesses. Since the fire marshals were not witnesses to the events leading up to the fire, they could not testify as to its cause. And, without sufficient facts and qualifications, they could not even testify as experts. Thus, the reading of the report was palpably an attempt to do indirectly what could not be done directly.

Furthermore, the trial court greatly enhanced the prejudice to petitioners resulting from the introduction of the fire marshal's report when it made the following inflammatory remarks before the jury, leaving the impression that the report was acceptable beyond question and hence conclusive on the issue of negligence.

> "I guess I have tried a hundred thousand cases in my time and I have never known of any Judge or any Court to fail to accept the report of a fire marshal, and I have accepted it here and it is going to stand." (Appendix to Appellant's Brief, p. 161a.)

Shortly thereafter, the following colloquy took place between the court and Chief Fire Marshal Scott, wherein the court interrogated the fire marshal by leading questions which amounted to justifying the marshal's course of action before the jury:

"The Court: You have testified that you examined Mr. Barnao, Marshal?

A. I did, sir,

The Court: You talked to him?

The Witness: I did, sir.

The Court: And he told you that he had observed men smoking?

The Witness: Right.

The Court: He did not tell you that he had seen any men drop any lighted cigarettes or matches?

The Witness: No, sir.

The Court: You thought, therefore, that once having determined the origin and the source of the fire it was unnecessary for you to add any more names or to put any more names down.

Now, isn't that exactly it?

The Witness: That is it exactly, Judge.

The Court: All right. Let us go on to something else. I will give you time to sort your notes. We will take a short recess. I don't intend to make a career of this case. Let us get going."

Moreover, the trial court personally vouched for the responsibility of the fire marshal's office when it said:

> "This is a report from a responsible agency and I am accepting it as such." (Appendix to Appellant's Brief, p. 169a.)

The statements of the trial judge, and the aura which a fire marshal's report has, under the circumstances, clearly influenced the jury in its determination of the cause of the fire.

Ordinarily, the mere fact that a person is unsuccessful in a court in a matter involving life, liberty or property, does not show that there has been a violation of the due process of law guaranty. However, it has been intimated that if the error is gross and obvious, coming close to the boundary of arbitrary action, there may be a violation of the guaranty. Mr. Justice Cardozo, in *Roberts* v. *New York City*, 295 U. S. 264, in speaking of a wrong done due to a court having made a mistake as to evidence, said, "To

bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action" (p. 277).

Petitioners maintain that the rulings of the trial court respecting the admission of the fire marshal's report in evidence were extremely prejudicial and arbitrary in that it characterized the report as being unquestionably acceptable to the extent that, having tried a hundred thousand cases in its time, it has never known of any judge or any court to fail to accept a fire marshal's report, and "this is a report from a responsible agency and I am accepting it as such." Thus, the Court without further instructions in the premises, took from the jury their function of weighing the credibility to be given the report and practically directed them to ratify the report and render judgment on that basis against petitioners.

This Court in the recent case of *Hawkins* v. *United States,* reported in U. S. Sup. Ct. Reports, Vol. 3, L. Ed. 2nd 125, decided November 24, 1958; held that it could not be sure that the testimony of a wife, as to her sordid past both before and after marriage, though in part cumulative, did not tip the scales against her husband, on the close and vital issue of whether his prime motivation in making an interstate trip was immoral and it accordingly reversed the conviction although the Court had been urged to affirm upon the alternative holding of the Court of Appeals that the wife's evidence was harmless. Petitioners likewise contend that no court can be sure that the admission of the fire marshall's report did not tip the scales against them in the instant case.

Further, it is clear from reading the federal authorities that there is a conflict with respect to the interpretation and application of the rule in Section 1732 as between different circuits. The main opinion in the instant case cites several cases decided by the Court of Appeals for the Second Circuit, showing liberal application of the rule, among them, *Korte* v. *New York, New Haven & Hartford*

R. R. Co., 191 Fed. 2d 86. However, it should be noted that in that very case, Chase, Ct. J., dissented and contended for a strict interpretation, stating that the prevailing opinion in that case, "seemed to be a rather complete disregard of what was decided in *Palmer* v. *Hoffman*, 318 U. S. 109" and he would reverse and remand. He recommended in his dissent that the 2nd Circuit Court should follow *Masterson* v. *Pennsylvania R. Co.*, 182 Fed. 2nd 793, a case decided by the Third Circuit Court of Appeals, which Chase, Ct. J., said "preserves the safeguards which must be respected to determine correctly whether the statute applies".

Moreover, in the instant case, while Lombard, Ct. J., held that admission of the fire marshal's report violated the rule in Section 1732 (but was not error for other reasons), Clark, Ch. J., on the other hand in a separate opinion held that the report was admissible.

Since the federal district courts are daily required to rule upon the admissibility of reports offered under the rule set forth in Section 1732 it would appear to be of prime importance to the federal bar that this court consider and define the practical boundaries to govern the application of the rule to the end that there may be uniformity in the application of the rule by the courts throughout the land.

CONCLUSION

Since the reception of the fire marshal's report in evidence was erroneous and served to dominate the trial and supplant the functioning of the jury, and thereby deprived petitioners of a fair trial, the judgments of both Courts below should be revised and petitioners should be granted a new trial on the merits.

Respectfully submitted,

RAYMOND E. STEFFERSON,
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of Counsel.

Appendix

(Opinion of United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 277—October Term, 1957

(Argued April 15-16, 1958 Decided July 15, 1958)

Docket No. 24619

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Plaintiff-Appellee,

v.

JULES S. SOTTNEK CO., INC., SOTTNEK TERMINAL CORPORATION,
Defendants-Appellants, and Third Party Plaintiffs,

v.

NEW YORK DOCK COMPANY,
Defendant.

Before:

CLARK, *Chief Judge*, LUMBARD and WATERMAN,
Circuit Judges.

Appeal from a judgment of the District Court, Southern District of New York, Edward P. Murphy, Judge, entered on the verdict of a jury, awarding the plaintiff a total of $10,019 for fire damage allegedly caused by the defendant's negligence. Affirmed.

THEODORE A. KELLY, New York, N. Y. (VINCENT E. McGOWAN, New York, N. Y., on the brief), for plaintiff-appellee.

SEYMOUR SIMON, New York, N. Y. (RICHARD T. GRAHAM and RAYMOND E. STEFFERSON, New York, N. Y., on the brief), for defendants-appellants.

LUMBARD, *Circuit Judge*:

This is an appeal from a judgment entered on the verdict of a jury by Judge Murphy, Southern District of New York, awarding the plaintiff $9,636 for damages to its scow and $383 for loss of the personal effects of its scow master caused by a fire allegedly ignited through the negligence of the defendants. A third party complaint against the New York Dock Company was dismissed and no appeal is taken from that order.

On April 24, 1951, the plaintiff's scow, CRR 230, was tied up to the bulkhead between Piers 30 and 32 in Brooklyn, New York. The stern of the scow was approximately 6 feet north of the open storage area on Pier 32. The pier was owned by the New York Dock Company and was leased to the defendant, Sottnek Terminal Corporation. The other defendant, Jules S. Sottnek Co., Inc., was in possession of the dock where it was conducting stevedoring operations. On the day of the fire and during the previous night stevedores in the employe of the defendant, Jules S. Sottnek Co., Inc., were unloading naphthalene, packaged in burlap bags, from the M/V Gudrun Maersk. These bags were piled in two pyramids on the Pier 32 open storage area. One of the piles, containing some 3,000 bags, was close to the stern of the plaintiff's scow; the other, a much smaller pile, was located on the bulkhead adjacent to the starboard bow of the scow. Between the two pyramids of naphthalene and at the corner of the slip was a pile of cork.

At about 1:50 P.M. on April 24, 1951 a fire broke out in the larger pile of naphthalene and destroyed it and the

pile of cork. The fire spread to the stern of the scow causing the damages for which recovery is sought in the present action.

The plaintiff alleged that the fire was caused by the carelessness of stevedores employed by the defendant, Jules S. Sottnek Co., Inc., in that they were smoking while working around the naphthalene. The defendants, on the other hand, maintained that the fire was caused by spontaneous combustion in the naphthalene pile. The jury found for the plaintiff and the defendants now seek to upset the verdict and the judgment entered thereon by the District Court, claiming that there was insufficient evidence in the record to sustain the jury's findings of negligence and damages.

Assuming for the moment that the negligence of the defendant was proved, we turn first to the question of damages.

On April 30, 1951, after the cargo had been discharged from the scow, a survey was held on board the CRR 230 in a repair yard owned jointly by three railroads, including the plaintiff, Central Railroad Company of New Jersey. Both the plaintiff and defendant were represented at the survey, and the agent of the M/V Gudrun Maersk, from which the naphthalene had been discharged, sent Mr. William R. Bagger to represent it. On the survey it was found that the end planking, sheathing, rake fenders, corner fenders, side planking, rail log, bumper guards and main decking of the vessel's stern had been burned and the cabin had also been destroyed. Mr. Bagger refused to sign the survey because it was his opinion that the bumper logs did not have to be replaced as they had only been scorched, and because the cost of repairs exceeded his estimate of the value of the scow.

At the trial Mr. Bagger testified that the cost of repairs as agreed on by the surveyors was $9,636. The survey itself, though marked for identification, was not introduced into evidence. Mr. Bagger further testified that he had made another survey of the vessel in 1957 and he had found that

some of the repairs called for by the survey had not been made, and that it was his opinion that the reasonable cost of the repairs actually made was $6,964. The appellant argues that the recovery should be limited to this latter amount.

It is clear that the applicable measure of general damages in this case is the difference between the market value of the scow immediately before and immediately after the injury. See *O'Brien Bros., Inc. v. Steamtug Helen B. Moran*, 160 F. 2d 502 (2 Cir. 1947). If complete repairs had been carried out, recovery would have been limited to their cost, *The Hygrade No. 24* v. *The Dynamic*, 233 F. 2d 444 (2 Cir. 1956), but this approach is only a practical substitute for the "diminution of market value" rule. The scow owner is not required to make repairs if he is to recover.

The damages arrived at by the jury in using this test finds support in the evidence. First, Mr. Bagger testified to the amount arrived at in the survey, that the survey was correct in all respects save one, and that he refused to sign it solely because of a difference in opinion regarding the item of the bumper logs and because he thought the scow was not worth the repairs. Secondly there was evidence in the form of bills, qualified by the clerk under whose supervision they were drawn up, which indicated that the actual cost of repairs exceeded the survey estimate. Finally, the plaintiff called its former superintendent of floating equipment who testified that in the discharge of his duties he was often called upon to evaluate equipment and that the CRR 230 was worth $15,000 before the fire and $4,000 after. This evidence amply supports the jury's determination of damages.

We then come to the proof regarding negligence. The defendants maintain that the fire was caused by spontaneous combustion and produced as a witness a chemist who testified that spontaneous combustion possibly was the cause. A cargo checker in the defendant's employ also testified that while he was standing near the naphthalene he saw a trickle

of liquid suddenly shoot out from the floor of the stow and burst into flame.

On the other hand, James Rugar, captain of the damaged scow, testified that he saw stevedores and crane operators smoking in the vicinity of the naphthalene during the noon hour. In this he was corroborated by Captain Barbir of the scow Solvay which had been anchored in the slip in front of the CRR 230. Captain Barbir further testified that he had seen men smoking about the bags less than 20 minutes before the fire started. From this evidence the jury could infer that carelessness while smoking caused the fire. See *U. S. Lighterage Corp.* v. *Peterson Lighterage Co.*, 142 F. 2d 197 (2 Cir. 1944). Indeed both of the city Fire Marshals, one having been called by each side, testified that it was their opinion that the fire was caused by smoking negligence.

The jury thus had evidence before them as to both of the explanations advanced. Under these circumstances, it was the jury's province to determine how the fire started and their verdict for the plaintiff must stand.

Finally, the appellant challenges the admission into evidence of a report of a New York City Fire Marshal in which he stated the cause of the fire to be "smoking carelessness." The report goes further to state that an employee of Jules S. Sottnek Co., Inc. stated that he had frequently seen men smoking when working on the bulkhead. The Fire Marshals testified that they spoke to some twenty people at the fire scene, but their report listed only one who mentioned smoking on the pier, and he denied at the trial the statements attributed to him in the report. The report was received in evidence under the statute permitting the introduction of records kept in the regular course of business. 28 U. S. C. § 1732.

Under the circumstances of this case, we hold that the reception of the record was not reversible error. Here, plaintiff called Fire Marshal Canty, the maker of the report, who testified, without objection, to his conclusion that the

fire was caused by smoking carelessness. Defendants called as its own witness Chief Fire Marshal Scott, who participated with Canty in the investigation conducted by the New York City Fire Department to determine the origin of the fire. He, too, on direct examination by defendants' counsel, testified that as a result of his investigation he believed the fire to have been caused by smoking carelessness. Thus the reception of the report was merely cumulative.

Not having objected to the testimony of the Fire Marshals, and indeed calling one of them as their own witness, appellants cannot claim that the admission of the parallel report is reversible error.

Whether we would have come to the same result absent the Fire Marshal's testimony is another question which we do not reach in disposing of this appeal. However, it should be noted that the theory underlying the statute admitting business records as an exception to the hearsay rule, is that they have the "earmarks of reliability" or "probability of trustworthiness." *Palmer* v. *Hoffman*, 318 U. S. 109 (1943). The Supreme Court there ruled that business records reflecting the day to day operations of the enterprise, and which were relied upon on the conduct of the business, did have an inherent probability of trustworthiness; but a statement in an accident report, even though taken regularly in the conduct of the business, was not within the business records statute.

The federal courts generally apply the more liberal evidentiary rule between the federal and state rules so as to favor the reception of evidence. Rule 43(a) Federal Rules of Civil Procedure, 28 U. S. C. A. The question then is whether the report could be received under either rule.

It seems clear that the Fire Marshal's report would not be admissible in New York courts. New York Civil Practice Act § 374a; *Johnson* v. *Lutz*, 253 N. Y. 124 (1930); *Williams* v. *Alexander*, 309 N. Y. 283 (1955); *Cox* v. *State*, 3 N. Y. 2d 818 (1958).

The federal rule would require the same result. The salutary purpose underlying the business record statute is "* * * to bring the realities of business and professional practice into the courtroom in usual form." *Korte* v. *New York, New Haven & Hartford R.R. Co.*, 191 F. 2d 86 (2 Cir. 1951), cert. den. 342 U. S. 868. Although in *Pekelis* v. *Transcontinenetal and Western Air, Inc.*, 187 F. 2d 122 (2 Cir. 1951), cert. den. 341 U. S. 951, we sanctioned the admission of the defendant airline's accident investigation reports, the reports there were offered by the plaintiff, not the entrant, and the reports were against the airline's interest when made and were based on informants [e.g. the pilot, co-pilot, groundcrew, etc.] who were under a duty to report to the investigating board. Thus the safeguards to reliability were amply present.

We have also cautioned that not every record is admissible under the statute, when we said that " 'multiple hearsay' is no more competent now than single hearsay was before." *United States* v. *Grayson*, 166 F. 2d 863 (2 Cir. 1948). The trial judge must exercise caution to be sure that a document offered under this statute has an inherent probability of trustworthiness.

In any event, the reception of the report in this case did not constitute error.

Affirmed.

CLARK, *Chief Judge* (concurring in the result):

I concur in the affirmance and in the opinion herewith except for the dictum that the New York City Fire Marshal's report was not admissible in evidence. We need not decide that here; if pressed to a decision I should hold it admissible, the objections going to its weight, rather than its admissibility. *Pekelis* v. *Transcontinental & Western Air, Inc.*, 2 Cir., 187 F. 2d 122, 23 A. L. R. 2d 1349, certiorari denied *Transcontinental & Western Air, Inc.* v. *Pekelis*, 341 U. S. 951; *Korte* v. *New York, N. H. & H. R. Co.*, 2 Cir., 191 F. 2d 86, certiorari denied *New York, N. H. & H. R. Co.* v. *Korte*, 342 U. S. 868.